

**BEFORE THE NATIONAL LABOR RELATIONS BOARD**

PCA Central California  
Corrugated, LLC,

Employer,

and

Case 20-RC-248663

Association of Western Pulp  
and Paper Workers,

Petitioner.

**EMPLOYER’S REQUEST FOR REVIEW  
OF THE REGIONAL DIRECTOR’S DECISION TO OVERRULE EMPLOYER’S  
OBJECTION TO ELECTION AND CERTIFICATION OF REPRESENTATIVE**

Now comes the Employer, PCA Central California Corrugated, LLC (“Employer”) through its counsel, and pursuant to Sections 102.67 and 102.69(c)(2) and of the Board’s Rules and Regulations, requests review of the Regional Director’s Decision to Overrule Employer’s Objection to Election and Certification of Representative dated November 26, 2019 (“Decision”).

**SUMMARY OF THE EMPLOYER’S POSITION**

The Board should reverse the Decision and set aside the election held on November 7, 2019.<sup>1</sup> The Regional Director’s Decision and Direction of Election (“DDE”) and Notice of Election contained the wrong eligibility date of September 22, over a month before the correct eligibility date of October 27. The Regional Director’s issuance of an Errata and Revised Notice of Election correcting the wrong eligibility date after the close of business on the day before the election, without postponing the election to provide the Employer three (3) business days to post the Revised Notices before voting began defied the Board’s rules and purposes of the Act, likely

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<sup>1</sup> Unless otherwise noted, all subsequent dates referenced herein are in 2019.

created confusion among voters, and cast a reasonable doubt as to the fairness and validity of the election. This is particularly troublesome given that over 11% of the voting unit did not vote in the election, less than half of the employees in the voting unit actually voted for the Petitioner, and a swing of only three votes would have resulted in the Petitioner losing the election.

For these reasons, the Board should grant this Request for Review.

### **FACTS**

#### **I. THE REGIONAL DIRECTOR'S DDE AND THE EMPLOYER'S NOTICE OF WRONG ELIGIBILITY DATE AND REQUEST FOR POSTPONEMENT TO ALLOW SUFFICIENT TIME TO POST THE CORRECT NOTICE OF ELECTION**

On September 23, the Association of Western Pulp and Paper Workers ("Union") filed an RC petition with Region 20 of the NLRB, seeking to represent a bargaining unit of "production employees including maintenance and Truck drivers" at the Employer's facility in McClellan, California ("Petition"). A Representation Hearing commenced on October 8.

On November 1, the Regional Director issued her DDE, amending the Petition over the Employer's objections to include shipping employees, and directing an election among a collective bargaining unit of "[a]ll full-time and regular part-time employees employed at the Employer's McClellan Facility in the Trucking, Production, Maintenance, and Shipping Departments; excluding all temporary employees, guards, and supervisors as defined by the Act" (DDE at 10). The Regional Director ordered that the election be held only three full working days later -- on November 7 -- from 5:00 a.m.- 7:30 a.m.; 2:00 p.m.-3:30 p.m.; and 5:30 p.m.- 6:30 p.m. in the Corrugator Conference Room at the facility.<sup>2</sup>

The Employer's last payroll period end date preceding the DDE was Sunday, October 27. However, the Regional Director provided in the DDE that "[e]ligible to vote are those in the unit

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<sup>2</sup> The Employer filed its Request for Review of the Regional Director's DDE on November 15, 2019.

who were employed during the payroll period ending *September 22, 2019*, including employees who did not work during that period because they were ill, on vacation, or temporarily laid off” (*Id.* at 10) (emphasis added). The Regional Director also provided a Notice of Election and ordered that, pursuant to Section 102.67(k) of the Board’s rules, the Employer post for three full working days prior to 12:01 a.m. of the day of the election copies of the Notice of Election and distribute the Notice of Election electronically to employees with whom it customarily communicates electronically. The Notice of Election describes the “Employees Eligible to Vote” as “[a]ll full-time and regular part-time employees employed at the Employer’s McClellan Facility in the Trucking, Production, Maintenance, and Shipping Departments who were employed by the Employer during the payroll period ending September 22, 2019.”

The Employer realized the Regional Director’s error on November 5 and immediately filed with the Region a Notice of Wrong Eligibility Date and Request for the Regional Director to Withdraw and Reissue the Direction of Election and Election Notice, via the Board’s E-filing system in a PDF document titled “PCA\_ Notice.pdf” (“Notice”). At 5:57 p.m. Central Time, the Employer’s counsel received an emailed confirmation from the Board’s E-filing system, acknowledging the Employer’s successful filing of the “PCA\_ Notice.pdf” document with the Region (Exh. A).

In its Notice, the Employer notified the Regional Director that she had provided the wrong eligibility in the DDE and Notice of Election, and thus requested that the Regional Director (1) withdraw the current DDE containing the wrong eligibility date of September 22 and issue a new Direction of Election with the correct eligibility date; (2) withdraw the current Notice of Election and issue a new Notice of Election containing the correct eligibility date; and (3) postpone the election scheduled for November 7 and direct an election for an appropriate date

that will provide the Employer three full working days prior to 12:01 a.m. of the day of the election date to post and distribute the revised Notice of Election (Notice at 2-3). The Employer noted the Board's policies and procedures underlying the three day notice period and the likely disenfranchisement and confusion among voters should the election proceed as scheduled in light of the wrong eligibility date being used (*Id.*). The Employer also timely filed its Voter List on November 5, which excluded employees hired after the eligibility cutoff of September 22, as provided in the DDE and Notice.

The Regional Director, however, did not respond to the Notice until 5:49 p.m. Pacific time on November 6, less than 12 hours before voting was to begin, when the Regional Director finally issued an Errata to the Decision and Direction of Election ("Errata") and revised the Notice of Election ("Revised Notice") with the corrected voter eligibility date of October 27. The Regional Director advised that the Employer "post the Errata and corrected Notice of Election on bulletin boards and other conspicuous places in areas where the employees in the bargaining unit work. To help avoid an issue about the adequacy of the posting period, the notices should be posted immediately upon receipt."

Less than an hour after receiving the Errata and Revised Notice, the Employer emailed the Secretary to Assistant Director, informing her that no manager or agent authorized to post the Revised Notice was at the facility after 5:00 p.m. on November 6 and that "without some clarification or communication concerning the issuance and posting of a revised notice, the last minute correction is . . . without impact." The Regional Director did not respond. The Employer was unable to post the Revised Notice until less than one hour before the first scheduled voting session at 5:00 a.m. Pacific time on November 7.

Ultimately, only 126 out of approximately 142 eligible voters actually voted in the November 7 election and less than 50% of all eligible voters voted for the Petitioner. While the Petitioner received a slight majority of the votes cast (66-60), a swing of just three votes would have resulted in the Petitioner receiving less than a majority of the valid votes cast.

## **II. THE EMPLOYER’S OBJECTION TO ELECTION AND THE REGIONAL DIRECTOR’S DECISION**

On November 14, the Employer timely filed its Objection to the Election and Conduct Affecting the Election and Offer of Proof in Support of Election (“Objection”). The Employer objected to the election on the grounds that the initial Notice of Election prepared by the Regional Director and posted at the Employer’s premises did not meet the requirements of Sections 102.67(k) and 103.20 of the Board’s Rules because of the material error in the voter eligibility date and because the Regional Director improperly did not allow the Revised Notice to be posted at all, let alone for three full working days prior to 12:01 a.m. of the day of the election as required by the Board’s rules. The Employer argued that this conduct interfered with employees’ abilities to exercise a free and reasoned choice in the election, tainted the election results, and violated the Board’s Rules, as well as the policies of the Act.

On November 18, the Region requested the Employer provide current payroll records for the entire voting unit up to and through the November 7 election date which would show the unit employees’ dates of hire. On November 22, the Employer timely provided the requested information, which showed all active employees in the voting unit described in the DDE as of the November 7 election date, including two employees who were hired into the voting unit after the incorrect eligibility date of September 22, but before the correct eligibility date of October 27.

On November 26, the Regional Director issued her Decision, overruling the Employer's Objection and issuing a Certification of Representative. The Regional Director acknowledged that "[i]t is uncontroverted that the Notice [of Election] contained an erroneous payroll-period-eligibility date [] of September 22 (rather than the correct date of October 27) and that the Employer timely posted that Notice in conspicuous places, as required" (Decision at 2). The Regional Director also acknowledged that, in the afternoon on November 5, the Employer timely filed its Voter List along with the Notice, urging the Regional Director to correct the eligibility date and postpone the election to allow three days for posting of the Revised Notice (*Id.*). Although the Regional Director acknowledged the "initial oversight" in discovering that the Notice had been filed, citing an "atypical descriptor" of "XYZ.20-RC-248663.PCA\_ Notice.pdf" that had been assigned to the document (*Id.* at 2), the Regional Director made no findings as to how or why the atypical descriptor was assigned to the Employer's Notice in the Board's systems. More importantly, the Regional Director did not explain how this "atypical descriptor" in any way mitigated her error.

Nonetheless, the Regional Director found that there was "no claim or evidence" by the Employer that the Board's Notices of Election fell short of the Board's standards, and that the Employer only "objects to the inaccurate [eligibility] date on the original Notice and the Region's decision not to delay the election to allow for posting of the Corrected Notice for three full days" (*Id.* at 4). The Regional Director found that the Board's "primary consideration" that employees are given adequate notice and sufficient opportunity to vote was not at issue because "only two employees could have possibly been misled or confused about their eligibility to vote in the election" by the erroneous eligibility date on the original Notice of Election and that both employees had cast valid ballots in the election (*Id.*). Accordingly, the Regional Director found

that there was “no evidence that any employees were disenfranchised as a result of the incorrect [eligibility] date,” that the inaccuracy of the initial Notice of Election did not affect the election results, and the inaccuracy did not raise “a reasonable doubt as to the fairness and validity of the election” (*Id.*). For the reasons that follow, however, the Regional Director applied the wrong standard in an attempt to minimize the significance of her error.

### **STANDARD OF REVIEW**

Pursuant to Sections 102.67 and 102.69(c)(2) of the Board’s Rules and Regulations, a request for review of the Regional Director’s ruling on objections may be granted, *inter alia*, upon the following grounds:

*Grounds for review.* The Board will grant a request for review only where compelling reasons exist therefor. Accordingly, a request for review may be granted only upon one or more of the following grounds:

- (1) That a substantial question of law or policy is raised because of:
  - (i) The absence of; or
  - (ii) A departure from, officially reported Board precedent.
- (2) That the Regional Director’s decision on a substantial factual issue is clearly erroneous on the record and such error prejudicially affects the rights of a party.
- (3) That the conduct of any hearing or any ruling made in connection with the proceeding has resulted in prejudicial error.
- (4) That there are compelling reasons for reconsideration of an important Board rule or policy.

29 C.F.R. § 102.67(d), 102.69(c)(2) (“If the election has been conducted . . . by a direction of election issued following any proceeding under §102.67), the parties shall have the right to Board review set forth in §102.67”).

## **ARGUMENT**

### **THE REGIONAL DIRECTOR ERRANTLY OVERRULED THE EMPLOYER'S OBJECTION TO ELECTION**

The Regional Director's overruling of the Employer's Objection to Election and refusal to postpone the election to provide three business days prior to the election to post the Revised Notice containing correct eligibility information contravened Board policy.

To begin, the Regional Director does not provide any Board authority or other justification for her refusal to allow three additional business days for the Employer to post the Revised Notice. In promulgating its new rules, the Board "recognized that the official Board Notice of Election contains important information with respect to employee rights under the Act and that such information should be conveyed to the employees far enough in advance of the election so that employees will be adequately apprised of their rights. By establishing a specific length of time for posting, the provision made clear to the parties their respective responsibilities and obligations with respect to notice posting and attempted to eliminate unnecessary and time-consuming litigation on this issue." *NLRB Explanatory Statement to Rules and Regulations* § 103.20.

While there is no "*per se* rule" that elections must be set aside following procedural irregularities, the Board has strictly enforced its three-day notice posting rule. *See, e.g., Smith's Food and Drug*, 295 NLRB 983, 983-84 (1989) (finding the employer failed to fully comply with the Board's three day notice posting rule, where the notices for one location were mailed to an incorrect address and the employer immediately notified the Board and posted extra copies of the notice at the location, but only posted the notices less than two days before the election). *See also Gaetano & Assocs. Inc.*, 344 NLRB 531, 542 (2005) ("The Board has held that the [three-day posting] rule is strictly enforced."). The Regional Director cited no authority for the



proposition that the Board's three-day notice posting requirement does not apply to revised or corrected notices or that the Board allows the period of time that an incorrect notice was posted to be tacked onto the period required for posting of corrected or revised notices.

As a matter of principle and of law, it has long been understood that both the public and the government are required to adhere to duly promulgated regulations. Further, the precedential support for the doctrine that an agency must adhere to its own regulations is ample, *see e.g.*, *Yellen v. United States*, 374 U.S. 109, 117-18 (1963) (legislative committee with complete discretion to order public testimony after hearing may not require public testimony without a hearing); *Vitarelli v. Seaton*, 359 U.S. 535, 539-40 (1959) (Secretary of Interior with power to discharge employee summarily must follow procedural regulations if discharge is based on national security grounds); *United States ex rel. Accardi v. Shaughnessy*, 347 U.S. 260, 261-62, 268 (1954) (failure of Attorney General to follow regulations makes deportation order invalid even if individual was admittedly deportable), and goes at least as far back as the Supreme Court's decision in *Arizona Grocery Co. v. Atchison, Topeka & Santa Fe Railway*, 284 U.S. 370 (1932) (ICC acted illegally in retroactively repealing its previously prescribed rate). Consistent with these principles, the Board has recognized its obligations in conducting representation elections to "maintain and protect the integrity and neutrality of its procedures." *Athbro Precision Engineering Corp.*, 166 NLRB 966 (1967), *vacated on other grounds by* 171 NLRB 21 (1968).

Here, the Regional Director's lenience toward her own oversight and her failure to follow Board policies undermines the purposes of the three-day posting rule and warrants the Board's reversal of the Decision. The Employer made a good-faith request to postpone the election so that it could comply with the Board's three-day posting rule and provide ample opportunity for

all employees to receive notice of their rights. Indeed, the Employer notified the Regional Director immediately after discovering the eligibility date error on the initial Notice of Election rather than playing “gotcha” by waiting until after the election to raise the issue.

While the Regional Director notes that the Employer’s Notice was assigned an “atypical descriptor” of “XYZ.20-RC-248663.PCA\_ Notice.pdf,” as if to justify her error, this “atypical descriptor” was by no fault of the Employer, as the confirmation email the Employer’s counsel received from the Board’s E-filing system shows that its Notice was filed under the correct name and case number (Exh. A). Regardless of the reasons behind the assignment of the “atypical descriptor” and the Region’s acknowledged “initial oversight” in discovering the Employer’s Notice, the Regional Director did not issue the Errata and Revised Notice with the corrected voter eligibility date of October 27 in sufficient time for the employees to be aware of the correct eligibility date.

In fact, the Regional Director acknowledged the importance of the Board’s posting requirements when issuing her Errata and Revised Notice and advising the Employer to post the Revised Notice immediately “to help avoid an issue about the adequacy of the posting period.” Despite her instructions and acknowledgement of a potential “issue about the adequacy of the posting period,” the Regional Director nevertheless refused to provide sufficient time for the Employer to post the Revised Notices and ignored the Employer’s concerns that no Employer agent would be available at the facility to post the Revised Notices until the shortly before the election was scheduled to begin on the morning of November 7. In light of the Region’s conduct, the Employer asks nothing more – but nothing less – than that the Board adhere to its own regulations and recognize that the election should not have been scheduled without the

correct Notice of Election with the correct eligibility date having been posted for at least three business days prior to the election.

Moreover, the Regional Director's Decision gives undue weight to her finding that the only two employees possibly affected by the incorrect eligibility date in the initial Notice of Election ultimately voted in the election. There is no evidence to show that the erroneous eligibility date in the Board's election notice in the Election Notice was not the reason why the other 16 non-voting employees did not vote. This potential prejudicial harm at minimum, created a "reasonable doubt as to the fairness and validity of the election," particularly given the closeness in the election result and that the Petitioner received less than half the votes of all eligible voters. In any event, the Board need not address the actual impact on the voters because the Regional Director errantly disregarded a well-settled and strictly-enforced Board rule requiring three days' notice of which employees are eligible to vote simply to achieve an expedited election.

In these circumstances, the Regional Director's error is especially troubling given the extremely short period of only three working days between the DDE and the election itself, the significant number of employees who did not vote (16/142 or over 11%), and the Petitioner receiving less than a majority of votes from all employees in the voting unit (66/142 or only about 46%). Thus, conduct by the Region potentially affecting voter turnout is especially significant because a swing of just three votes would have resulted in the Petitioner not receiving a majority of even the votes cast.

In sum, the Board should not condone the Regional Director's cavalier dismissal of the importance of the Notices of Election containing accurate information regarding an issue as important as voter eligibility, especially given the abbreviated period of only three full working

days between the DDE and the election date. Indeed, the Board's strict requirement of posting the Notice for at least three days would be rendered impotent if it permitted an Election Notice to contain wrong information about an issue as important as voter eligibility.

The Employer submits that, as with the erroneous findings and conclusions in the DDE, the error in the Notice of Election is attributable to the Regional Director's single-minded emphasis to pursue the fastest election date possible rather than the proper adjudication and analysis of the issues (*See* the Employer's November 15, 2019 Request for Review citing other actions by the Regional Director to short circuit a just and fair adjudication of the issues raised, especially her *sua sponte* amendment of the Petition to include shipping employees only after (1) the hearing had closed; (2) initially denying the amendment during the hearing; and (3) not permitting the Employer to litigate at the hearing the change in unit issue, including the community of interest issues that the amendment raised).

Accordingly, the Regional Director's last minute issuance of the Errata and Revised Notice on the eve of the Election, accompanied by her refusal to postpone the election to allow any time, let alone three full business days, to post the revised Election Notice, likely created confusion among voters as to their rights under the Act and defied the purposes of the Notice posting requirement and the NLRB's representation case rules generally. *See Smith's Food and Drug*, 295 NLRB at 984; *Athbro Precision Engineering Corp.*, 166 NLRB at 966. By overruling the Employer's Objection, the Regional Director disregarded well-established and strictly-enforced Board policies.

### **CONCLUSION**

For the foregoing reasons, the Employer requests that its request for review be granted, and that the Board reverse the Regional Director's Decision and set aside the results of the election held on November 7.

**DATED: December 10, 2019**

Very truly yours,

PCA CENTRAL CALIFORNIA CORRUGATED,  
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/s/ *Kenneth R. Dolin*

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# EXHIBIT A

**From:** [NLRBRegion20@nrlb.gov](mailto:NLRBRegion20@nrlb.gov) <[e-Service@service.nrlb.gov](mailto:e-Service@service.nrlb.gov)>  
**Sent:** Tuesday, November 5, 2019 5:57 PM  
**To:** Woodall, Carla D. <[cwoodall@seyfarth.com](mailto:cwoodall@seyfarth.com)>  
**Subject:** RE: 20-RC-248663 - Service Documents, Other, Service Documents, Voter List

**[EXT. Sender]**

**Confirmation Number: 1008688964**

You have successfully accomplished the steps for E-Filing document(s) with the NLRB Region 20, San Francisco, California. This E-mail notes the official date and time of the receipt of your submission. Please save this E-mail for future reference.

Date Submitted:	Tuesday, November 5, 2019 3:48 PM (UTC-08:00) Pacific Time (US & Canada)
Regional, Subregional Or Resident Office:	Region 20, San Francisco, California
Case Name:	PCA Central California Corrugated, LLC
Case Number:	20-RC-248663
Filing Party:	Employer
Name:	Kenneth Dolin
Email:	<a href="mailto:kdolin@seyfarth.com">kdolin@seyfarth.com</a>
Address:	233 S. Wacker Drive
	Chicago IL 60628
Telephone:	(312) 460-5522
Attachments:	Service Documents: Voter List - PCA cos.pdf Other: PCA_ Notice.pdf Service Documents: PCA Notice cos.pdf Voter List: Voter List - PCA_AWWPW.xlsx

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